

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

3. On September 26, 2001 SRS visited the petitioner's day care after receiving a complaint that she was caring for

more children than allowed under the terms of her registration. On that date the Department's investigator found that the petitioner was over numbers and that children were playing in restricted areas of the house and outside without supervision. It was also noted that there were unguarded electrical connections in the house and that the television was on tuned to a soap opera.

4. On that date the investigator gave the petitioner a form requiring her to notify all the parents of children in her care by mail that she had been cited by SRS for the above violations. The form required the petitioner to complete the parental notification process and to file a certificate of compliance with SRS by October 15, 2001.

5. Although the parental notification form was dated October 11, 2001, SRS did not receive it until October 24, 2001. The form listed eight parents whom the petitioner certified that she had notified by mail of the violations. On that date an SRS "Compliance Clerk" began calling the parents on the list to check the petitioner's compliance. At the hearing in this matter held on May 20, 2002, the clerk testified that if the first parent he called had indicated that she had received the notification he would have stopped checking. However, all six parents on the list that the clerk

was able to reach that day by phone (out of eight listed) denied that they had received anything from the petitioner. The clerk testified that he was very specific in his questioning of the parents to make sure that they understood what information he was seeking. This testimony was deemed to be highly credible (see infra).

6. On November 5, 2001, the Department's Licensing Supervisor sent the petitioner a letter informing her that failure to comply with parental notification was also a violation of the regulations and notifying her that a violation of any of the regulations may be cause to revoke her registration.

7. Following the above, and after several follow up visits from the Department's investigator, on November 20, 2001 the petitioner submitted a written Plan of Compliance in which she admitted the earlier violations and agreed to directly supervise the children whether they were inside or outside the house during their care.

8. On February 14, 2002 the SRS investigator visited the petitioner's day care after receiving another complaint regarding the lack of supervision of children in her care. When she arrived, the investigator observed two children playing in the backyard of a neighbor's house and, later, two

children playing unsupervised in the petitioner's backyard. In a letter dated February 22, 2001 SRS again notified the petitioner that it considered unsupervised children outside to be a "serious violation" requiring the petitioner to immediately correct the problem and to notify the parents of the children in her care that such a violation had occurred.

9. On March 1, 2002 the Department's Licensing Chief notified the petitioner that her registration would be revoked effective March 31, 2002 due to the cumulative violations that had occurred.

10. After receiving the above notice the petitioner called the Department to request a Commissioner Review hearing and to complain of the bias of the Department's investigator. A Commissioner Review hearing was scheduled for April 29, 2002

11. On April 25, 2002 the Department assigned a new investigator to make an unannounced visit to the petitioner's day care. This investigator testified that when she arrived at the petitioner's home that day she found two children under two years of age playing in the yard with no adult present. The investigator waited about ten minutes until the petitioner noticed her and came outside. The petitioner claimed the door to her yard was open the whole time and that she could see and hear the children outside. However, the investigator did not

believe that the petitioner was able to see and hear the children from where she had observed the children playing. Several other children were playing in several different rooms inside the house at the same time.

12. Based on testimony and diagrams of the petitioner's house submitted at the hearing it is found that it is impossible for someone even one step inside the door to the backyard of the petitioner's house to maintain eye contact with children all places in the yard and inside the house.

13. Following the Commissioner Review Hearing on April 29, 2002, the Department notified the petitioner on May 13, 2002 that it was revoking the petitioner's day care registration for all the reasons cited in the earlier revocation letter and the additional violations that had occurred on April 25, 2002.

14. At the fair hearing on May 20, 2002 the petitioner admitted that she had acknowledged and understood all the violations she had been cited for prior to April 25, 2002. She stated that on April 25 she had gone inside for a short time to get toys for older boys who were going outside, but that otherwise she was standing just inside the door. In light of the testimony of the investigator that she observed

the children unattended outside for about ten minutes (see supra), the petitioner's testimony is found not credible.

15. The petitioner also testified that she had mailed the parental notification forms as directed in October 2001 and that the parents contacted by the Department had later told her they were confused when the Department had called them to verify this.

16. The hearing officer advised the petitioner that based on what he had heard he would find the testimony of the Compliance Clerk (see supra) to be credible, but that he would grant the petitioner a continuance to enable her to call the parents to testify that they had received the notification form and had been confused when they told the compliance clerk they had not. The hearing officer offered to allow the petitioner to subpoena any witness she believed would so testify.

17. A hearing for this purpose was set for June 11, 2002. During a telephone conference on June 6, 2002 the petitioner represented that she had located only four of the six parents the Department had called in October 2001. The hearing officer told the petitioner that she could proceed with those four witnesses.

18. At the time set for hearing on June 11 the petitioner failed to appear. She subsequently informed the Board that she had decided not to proceed further because she felt that the hearing officer was predisposed not to believe her witnesses.

19. Based on the evidence presented it is found that the petitioner deliberately misrepresented to the Department that she had mailed parental notifications regarding the October 2001 violations when in fact she had not done so.

ORDER

The decision of the Department revoking the petitioner's family day care registration is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation of the Day Care Home Certificate. 33 V.S.A § 306(b)(1). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective October 7, 1996. Furthermore, the Commissioner has the specific

authority to revoke registrations "for cause after hearing."

33 V.S.A. § 306(b)(3).

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

SERIOUS VIOLATION - A violation of group size, staffing requirements or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

SUPERVISION OF CHILDREN - The knowledge of and accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm and maintenance of the program of the facility.

SECTION II - PROGRAM

2. There shall be at least one caregiver present and providing child care at all times when children are in care.

During outside play:

- a. Infants and toddlers shall be supervised by a caregiver present,
- b. preschoolers and school age children may be monitored from inside the home if their area or play is within sight and earshot of a caregiver.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND DIVISION OF LICENSING AND REGULATION

2. The Registrant shall notify the parent of each enrolled child, by mail, of a serious violation. . .

8. The Applicant or Registrant shall not interfere with, impede, deter, provide false information or cause another to do any of the aforementioned, or in any manner hinder the Department or its agent[s] in an investigation or inspection.
9. A violation of any section of the law or regulations regarding a Family Day Care Home may be cause for the revocation of the Registration Certificate.

If the petitioner has violated any of the above regulations, the Commissioner has the authority to determine what action to take and the "cause" needed to revoke a day care registration certificate if he deems it an appropriate remedy. 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981) Fair Hearing No. 10,414. The Board may only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. See Fair Hearing Nos. 12,804, 15,027, 15,430, and 17,263.

The facts in this case clearly show the violation of two important regulations; namely those dealing with supervision of children and false reporting to the Department of required compliance information. As noted above, the petitioner had been cited and warned at least five times over a period of more than five years of her duty to closely supervise children; and it is found that her misreporting of whether she

had notified parents of the violations found in October 2001 was deliberate and blatant.

Thus, the remaining question is whether the Department acted arbitrarily in determining that the petitioner's day care registration should be revoked. As noted above, the Commissioner has the authority to revoke any day care registration "for cause" under the statutory scheme. As noted above, the violation of any regulation may be "cause" for revocation. Furthermore, the above regulations single out lack of supervision as a "serious violation". The Department has the discretion to offer, and in this case repeatedly did offer, the petitioner the opportunity to correct any violation; but it also has the authority under the regulations to withdraw such an opportunity when the violation "poses risk of harm or is of a repeated nature." Id. Section VI(11).

In this case the Commissioner has determined to revoke the petitioner's day care registration because of the seriousness and repeated nature of the violations. Even if the Board would have reached a different conclusion on revocation, it cannot substitute its decision for that of the Commissioner if it is a reasonable one. The decision of the Commissioner revoking the petitioner's day care registration

must, therefore, be upheld. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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